

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

TIMOTHY P. HARRIS,

Plaintiff,

vs.

AMERICAN GENERAL FINANCIAL  
SERVICES, LLC,

Defendant.

Case No.: 2:10-cv-01662-GMN-VCF

**ORDER**

Pending before the Court is the Motion to Dismiss (ECF No. 31) filed by Defendant American General Financial Services, LLC. Pro se Plaintiff Timothy P. Harris filed a Response (ECF No. 37) and Defendant filed a Reply (ECF No. 38).

**I. BACKGROUND**

Plaintiff filed suit based on Defendant's reports of Plaintiff's delinquent accounts to national credit bureaus. On September 28, 2011, the Court issued an Order granting Defendant's motion to dismiss Plaintiff's claims (ECF No. 27), and permitting Plaintiff to amend his claim under Count III of his original complaint, which alleged violations of the Telephone Consumer Protection Act ("TCPA"), Public Law 102-243. Plaintiff filed an amended complaint on October 20, 2011, alleging five claims against Defendant for violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"), and one claim under the TCPA. (ECF No. 29)

In his Amended Complaint, Plaintiff explains this failure to file an amended complaint consistent with the Court's Order, arguing that "upon appeal the courts will side with the Plaintiff [regarding Plaintiff's FCRA claims] and this case will have to be sent back to this court for further proceedings. Plaintiff also states that he "will stipulate to the courts[sic] decision under section III of Plaintiff's original complaint and will cease arguing this point if the court

1 will consent to the fact that the Plaintiff has a private right of action under 1681n & o and  
 2 1681s-2(a) & (b) which is under the FCRA 15 U.S.C. 1681 *et seq.*” (Pl.’s Am. Compl., 3:15-18.)

## 3 **II. LEGAL STANDARD**

4 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action  
 5 that fails to state a claim upon which relief can be granted. *See North Star Int’l. v. Arizona*  
 6 *Corp. Comm’n.*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss  
 7 under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint  
 8 does not give the defendant fair notice of a legally cognizable claim and the grounds on which it  
 9 rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the  
 10 complaint is sufficient to state a claim, the Court will take all material allegations as true and  
 11 construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d  
 12 896, 898 (9th Cir. 1986).

13 The Court, however, is not required to accept as true allegations that are merely  
 14 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*  
 15 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action  
 16 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation  
 17 is plausible, not just possible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*,  
 18 550 U.S. at 555).

19 A court may also dismiss a complaint pursuant to Federal Rule of Civil Procedure 41(b)  
 20 for failure to comply with Federal Rule of Civil Procedure 8(a). *Hearns v. San Bernardino*  
 21 *Police Dept.*, 530 F.3d 1124, 1129 (9th Cir.2008). Rule 8(a)(2) requires that a plaintiff’s  
 22 complaint contain “a short and plain statement of the claim showing that the pleader is entitled  
 23 to relief.” Fed. R. Civ. P. 8(a)(2). “Prolix, confusing complaints” should be dismissed because  
 24 “they impose unfair burdens on litigants and judges.” *McHenry v. Renne*, 84 F.3d 1172, 1179  
 25 (9th Cir.1996). Mindful of the fact that the Supreme Court has “instructed the federal courts to

1 liberally construe the ‘inartful pleading’ of pro se litigants,” *Eldridge v. Block*, 832 F.2d 1132,  
2 1137 (9th Cir. 1987), the Court will view Plaintiff’s pleadings with the appropriate degree of  
3 leniency.

4 If the court grants a motion to dismiss, it must then decide whether to grant leave to  
5 amend. The court should “freely give” leave to amend when there is no “undue delay, bad  
6 faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party by  
7 virtue of . . . the amendment, [or] futility of the amendment . . .” Fed. R. Civ. P. 15(a); *Foman*  
8 *v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear  
9 that the deficiencies of the complaint cannot be cured by amendment. *See DeSoto v. Yellow*  
10 *Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

### 11 **III. DISCUSSION**

12 As Defendant notes and Plaintiff appears to recognize, the Court only gave Plaintiff leave  
13 to amend his claim under the TCPA. The Court acknowledges that Plaintiff may appeal the  
14 dismissal of his claims under the FCRA, and limits its analysis here to Plaintiff’s amended claim  
15 under the TCPA.

16 In its previous Order, the Court explained that “Plaintiff fails to clearly indicate what law  
17 Defendant is alleged to have broken, and any response on the part of Defendant can only be  
18 guesswork.” (Order, 4:23-24.) The Court also noted that “statutes that appear to address the  
19 facts listed by Plaintiff do not permit a private cause of action.” (Order, 4:25 – 5:1.)

20 In the Amended Complaint, Plaintiff restates his claim verbatim as alleged in Count III of  
21 his original Complaint, and adds two additional paragraphs. (Pl.’s Am. Compl., 15:7-28.) The  
22 first paragraph restates the legal standard under Federal Rule of Civil Procedure 8 and under  
23 *Bell Atlantic Corp. v. Twombly*. Plaintiff also refers to “227b and 227d,” which appears to  
24 invoke 47 U.S.C. § 227. The second paragraph appears to argue that because Defendant has not  
25 shown proof of an account with Plaintiff and because there is no permissible purpose for

1 Defendant to make the listed calls to Plaintiff's cell phone, Defendant has violated the TCPA.

2 Section 227(b) describes restrictions on the use of automated telephone equipment.  
3 47 U.S.C. § 227(b). It prohibits the use of "any automatic telephone dialing system or an  
4 artificial or prerecorded voice" to make a call to emergency telephone lines, hospital and health  
5 care facility guest rooms, or to any telephone number for which the called party is charged for  
6 the call, other than for emergency purposes or with the prior express consent of the called party.  
7 47 U.S.C. § 227(b)(1)(A). It also prohibits the initiation of "any telephone call to any residential  
8 telephone line using an artificial or prerecorded voice to deliver a message without the prior  
9 express consent of the called party," except in emergency situations or other exempted  
10 situations. 47 U.S.C. § 227(b)(1)(B). It also provides for a private right of action for violations  
11 of subsection (b). 47 U.S.C. § 227(b)(3).


12 Section 227(d) describes technical and procedural standards for communications using  
13 telephone facsimile machines or automatic telephone dialing systems. 47 U.S.C. § 227(d). This  
14 subsection does not provide for a private right of action for violations, instead describing the  
15 Federal Communications Commission's authority to promulgate regulations pursuant to this  
16 subsection.

17 Here, Plaintiff has failed to allege that Defendant used an automatic telephone dialing  
18 system or an artificial or prerecorded voice in calling his cell phone. In fact, Plaintiff appears to  
19 allege specific persons who called his phone by listing the first names of persons alleged to have  
20 made each call. Plaintiff's allegation that Defendant had no permissible purpose or permission  
21 to make these calls therefore fails to state a claim under subsection 227(b) or 227(d) of the  
22 TCPA. As with Plaintiff's original Complaint, Plaintiff has again failed to state a claim upon  
23 which relief can be granted, and has failed to give Defendant adequate notice of any other  
24 claims against Defendant, if any are being alleged. Accordingly, Plaintiff's claim will be  
25 dismissed, with prejudice, and this case will be closed.

1 **IV. CONCLUSION**

2 **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss (ECF No. 31) is  
3 **GRANTED.** The Clerk shall enter judgment accordingly, and close this case.

4 **DATED** this 14th day of June, 2012.

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8 Gloria M. Navarro  
9 United States District Judge  
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